

CHAPTER 33

ARMY OFFICER AND NONCOMMISSIONED OFFICER EVALUATION REPORT APPEALS

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OUTLINE OF INSTRUCTION

I. REFERENCES.

- A. AR 623-1, Academic Evaluation Reporting System, 31 Mar 92.
- B. AR 623-105, Officer Evaluation Reporting System, 31 Mar 92.
- C. AR 623-105, Officer Evaluation Reporting System, 1 Oct 97 w/Change 1, 1 April 1998. Paragraph references to this regulation throughout this outline will be made to "NEW 623-105." The change referenced here contained no substantive changes. It merely clarified the "phased" applicability of the new OER system for Reserve Components.

Remember that the applicable regulation for reports and appeals of those reports is the regulation in effect *at the time the report is issued*. Thus, you must be familiar with BOTH the old and new systems and maintain copies of the old regulation.

- D. AR 623-205, Noncommissioned Officer Evaluation Reporting 31 Mar 92.
- E. Internet Resources:
 - 1. PERSCOM On-line: <http://www-perscom.army.mil>
 - 2. DA Publications Home Page: <http://www-usappc.hoffman.army.mil>

II. INTRODUCTION – THE NEW OER SYSTEM.

III. PURPOSE OF THE APPEAL PROCESS. (AR 623-105, Para. 9-1; NEW AR 623-105, para. 6-2; AR 623-205, Para. 4-1.)

- A. Protects Army's interest.
- B. Ensures fairness to the rated soldier.

- C. Ensures fairness to rating official.

IV. EXCEPTIONAL PROCESSING PROCEDURES.

- A. Referred reports (officers only) (AR 623-105, para. 4-27; NEW AR 623-105, paras. 3-32 & 3-33)
 - 1. Reports containing negative comments or ratings must be referred to rated officer for acknowledgment and comment.
 - 2. Rated officer's comments are attached to the report but do not constitute an appeal.
 - 3. NEW AR 623-105 has some fairly specific criteria for referral in para. 3-32.
- B. Relief for cause reports. (AR 623-105, para. 5-18; NEW 623-105, para. 3-50; AR 623-205, para. 2-10.)
- C. Commander's inquiry. (AR 623-105, paras. 3-15 and 5-30; NEW 623-105, paras. 6-3 & 6-4; AR 623-205, para. 2-15.)
 - 1. Commanders are required to look into alleged errors, injustices, and illegalities.
 - 2. Not a prerequisite for appeal.
 - 3. Informal procedures are used.
 - 4. Results can be forwarded to HQDA and may become part of the OMPF.
- D. Modifications to Submitted Reports. (AR 623-105, Chapter 5, Section V; NEW AR 623-105, Chapter 3, Section X.)
 - 1. Basic rule - OERs and NCO-ERs received by HQDA are presumed complete and accurate.

2. Requests to withdraw or modify report will not be granted unless new or unverified information would change rating.
 - a. If new information is favorable, follow regular appeal procedures.
 - b. If new information is derogatory, prepare an addendum, refer to rated officer, and submit.

V. EVALUATION REPORT APPEALS (AR 623-105, Chapter 9; NEW AR 623-105, Chapter 6; AR 623-205, Chapter 4.)

A. Types of Appeals.

1. Administrative (AR 623-105, para. 9-2h.; NEW AR 623-105, paras. 6-6h.; AR 623-205, para. 4-2h.)
 - a. Errors in parts I, II, IIIb, and Va of DA Form 67-8 (OER); parts I, II, IIIb, c, d, and IVc of DA Form 67-9 (NEW OER); parts I and II of DA Form 2166-7 (NCOER); or similar items on other forms.
 - b. Includes such things as deviation from the established rating chain, insufficient period of observation by the rating officials, and errors in the period covered.
2. Substantive (AR 623-105, para. 9-2i.; AR 623-205, para. 4-2i.)
 - a. Bias or prejudice
 - b. Inaccurate or Unjust Ratings
 - c. Any other matter that is not administrative.
 - d. NOTE: APFT Score & Height weight data are SUBSTANTIVE for NCOERs!
3. Combined Administrative & Substantive.

B. Potential Bases for the Appeal.

1. Deviation from regulation.
 - a. Report refers to conduct outside rating period. (AR 623-105, para. 4-17; NEW 623-105, paras. 3-24; AR 623-205, para. 6-4)
 - b. Comments are not limited to the forms. Report cannot contain continuation sheets. (AR 623-105, para. 4-18; NEW 623-105, paras. 3-25; *see* AR 623-205, para. 6-8)
 - c. Narrative gimmicks are contained in the report. (AR 623-105, para. 4-19; NEW 623-105, paras. 3-26; AR 623-205, para. 6-7d.)
 - d. Reference is made to unproven derogatory information. (AR 623-105, para. 4-21; AR 623-205, para. 6-5)
 - e. A rating official has been required to change a report. (AR 623-105, para. 4-20; NEW 623-105, paras. 3-27; AR 623-205, *see* para. 3-10c.(1)(c))
 - f. Inappropriate comments have been included. (AR 623-105, paras. 4-21.1 & 4-21.2; NEW 623-105, paras. 3-28 – 3-31; AR 623-205, para. 2-17, 6-6, 6-13, 6-14)
 - g. Adverse report not referred to officer for comment. (officers only) (AR 623-105, para. 4-27; NEW 623-105, paras. 3-32)
2. Error in the senior rater profile. (*See* AR 623-105, para. 4-16; NEW AR 623-105, para 3-22.)
3. Failure to counsel or to comply with support form procedures. (*See* AR 623-105, paras. 4-4 - 4-8.1; NEW 623-105, Chapter 3, Sections II & III; AR 623-205, para. 6-2)
4. Mistake made in preparing or typing the report.

5. Bias or prejudice on the part of a rating official.
- C. Who may File the Appeal? (AR 623-105, para. 9-2,; NEW 623-105, para. 6-6c.; AR 623-205, para. 4-2.)
1. The rated officer;
 2. Other interested parties in certain offices and agencies (e.g., Personnel Command (PERSCOM), Office of Deputy Chief of Staff for Personnel (ODCSPER), or TJAG).
 3. Other interested individuals must contact one of the above.
- D. Standard of Evidence and Burden of Proof. (AR 623-105, para. 9-7; NEW AR 623-105, para. 6-10; AR 623-205, para. 4-7.)
1. OER/NCO-ERs received at HQDA are presumed administratively correct, prepared by proper officials, and accurate.
 2. Appellants have the burden of proving by clear and convincing evidence that:
 - a. Presumption of regularity should not apply.
 - b. Action is warranted to correct a material error, inaccuracy, or injustice.
 3. Evidence must be competent, material, and relevant to the claim.
 4. Examples of insufficient evidence: (Not in NEW AR 623-105).
 - a. Rated officer's statement.
 - b. Statement from rater alleging error in judgment, administrative oversight, or typographical error.

- c. Statements or documents showing outstanding performance during unrelated periods.
 - 5. NEW 623-105 prohibits appeals based on improper sequencing of OERs for new senior rater profiling. (NEW AR 623-105, para. 6-10f.)
- E. When Must the Appeal be Filed? (AR 623-105, para. 9-3; NEW 623-105, para. 6-7; AR 623-205, para. 4-3)
 - 1. Administrative appeals: No prescribed time limit.
 - 2. Substantive appeals:
 - a. DA Form 67-8: Must be filed within 5 years of the completion date of the report absent exceptional circumstances.
 - b. DA Form 67-9: Must be filed within 3 years of the completion date of the report absent exceptional circumstances.
- F. Preparing the Appeal.
 - 1. Military memorandum format. (AR 623-105, Appendix N; NEW AR 623-105, Appendix F & Figures in Chapter 6; AR 623-205, Appendix F.)
 - a. Include name, rank, branch, SSN, period of report, and priority of the appeal.
 - b. Prepare a concise explanation of defect and requested corrective action. (Attach supplemental statement if lengthy).
 - 2. Attach supporting documentation, statements, and the contested OER/NCO-ER.
 - a. Statements must be the originals.

- b. Other documents must be certified copies.
 - 3. JAG offices will assist soldiers who request advice about preparing and submitting appeals. (TJAG Policy Letter 84-2 and AR 27-3).
 - 4. Practical advice. (AR 623-105, Appendix N; NEW 623-105, para. 6-12 & Appendix F; AR 623-205, Appendix F.)
- G. Processing the Appeal.
- 1. Appeals based on administrative error.
 - a. Adjudicated by Appeals and Corrections Branch, Personnel Command (PERSCOM) for OERs (AR 623-105, para. 9-2; NEW AR 623-105, para. 6-6h.) and by NCO Evaluation Report Appeals Section (Active Army), U.S. Army Records and Evaluation Center (USAREC) for NCO-ERs (AR 623-205, para. 4-2).
 - b. Errors in parts verified by rated officer accepted only under unusual circumstances.
 - c. Correction of minor errors will not invalidate an entire OER or NCO-ER.
 - d. Prove errors with certified copies of appropriate documents.
 - 2. Appeals based on substantive error. (AR 623-105, para. 9-5; NEW AR 623-105, paras. 6-6i. & 6-11; AR 623-205, para. 4-9)
 - a. Screened by PERSCOM (OERs) or USAREC (NCO-ERs).
 - b. OERs adjudicated by DCSPER Officer Special Review Board (OSRB) (AR 623-105, para. 9-2; NEW 623-105, para. 6-11). NCO-ERs adjudicated by DCSPER Enlisted Special Review Board (ESRB) (AR 623-205, para. 4-2).

- (1) Composed of at least three senior officers for OER appeals and three senior noncommissioned officers for NCO-ER appeals.
 - (2) Senior to the appellant and one with similar background if possible.
 - (3) Board recommendation based on majority vote.
 - c. DCSPER board procedures. (AR 623-105, para. 9-8; NEW AR 623-105, para. 6-11b.; AR 623-205, para. 4-8.)
 - (1) Administrative, nonadversarial.
 - (2) Not bound by rules of evidence.
 - (3) No right to appear in person.
 - (4) May contact interested parties directly.
 - d. Evidence required to support substantive error.
 - (1) Original typed statements from third parties, rating officials, and knowledgeable observers.
 - (2) Other documents from official sources.
- H. Resolution of the Appeal. (AR 623-105, para. 9-5; NEW 623-105, para. 6-8; AR 623-205, para. 4-5.)
 - 1. Priority system for resolving appeals. (AR 623-105, para 9-6; NEW AR 623-105, para. 6-9; AR 623-205, para. 4-6.)
 - a. First Priority.

- (1) Officers and NCOs twice nonselected for promotion with mandatory release date within six months.
 - (2) Certain officers and NCOs selected for involuntary discharge within six months.
 - (3) Officers identified for referral within six months by a DA Active Duty Board or a AGR continuation board.
 - (4) Officers recommended for elimination board including officers denied Voluntary Indefinite (VI) status.
 - b. Second Priority.
 - (1) Officers and NCOs once nonselected for promotion.
 - (2) Officers pending promotion list removal
 - c. Third Priority: all others.
2. An appeal may be approved in whole or in part.
- a. The relief may be different than that requested.
 - b. Board will not usually worsen appellant's position.
3. If the appeal is approved:
- a. Document is either corrected or deleted.
 - b. Memo is placed in OMPF performance fiche.
 - c. If appellant is a promotion passover, OSRB/ESRB determines whether to grant a relook board.

4. If the appeal is denied:
 - a. Notification letter is sent to the appellant.
 - b. Copy of letter is placed in OMPF performance fiche.
 - c. Appeal correspondence placed in restricted OMPF.
5. A case summary of board's consideration is available to the appellant.

I. Reconsideration of Appeals.

1. No provisions for requesting reconsideration for OER appeals.
2. Appellants may submit a new appeal to the OSRB/ESRB based on new information or additional evidence. (AR 623-105, para. 9-5; NEW AR 623-105, para. 6-8f; AR 623-205, para. 4-5)
3. Appellants may appeal Board's decision to the Army Board for Correction of Military Records (ABCMR).

VI. OTHER REMEDIES (IF THE APPEAL FAILS)

- A. The Army Board For Correction Of Military Records (ABCMR).**
1. ABCMR may correct any military record when necessary to correct an error or remove an injustice. (10 U.S.C. § 1552; AR 15-185).
 2. Consult AR 15-185 for procedures.
 3. ABCMR has broad power to recommend corrective action and fashion an appropriate remedy.
 - a. Claimants must specifically request monetary settlements.

- b. The Secretary of the Army approves ABCMR recommendations on OER/NCO-ER appeals.

B. Judicial Review.

1. Jurisdiction over OER/NCO-ER Appeals.

- a. U.S. Court of Federal Claims has jurisdiction over money claims founded upon the Constitution, any Act of Congress, or any regulation of an Executive Department. (28 U.S.C. § 1491).
- b. U.S. District Courts have concurrent jurisdiction of money claims under \$10,000. (28 U.S.C. § 1346).

2. Exhaustion of administrative remedies.

- a. General Rule: “A party may not seek federal judicial review of an adverse administrative determination until the party has first sought all possible relief within the agency itself.” Howell v. Immigration & Naturalization Service, 72 F.3d 288, 291 (2d Cir. 1995) (Howell contains a good summary of the exhaustion requirement.)
- b. Supreme Court Limitation on Exhaustion: Federal courts may not require exhaustion of available administrative remedies under the APA before judicial review of agency action where exhaustion not expressly required by statute, Darby v. Cisneros, 113 S.Ct. 2539 (1993). Note that this is an exception for the APA, NOT a blanket reversal of the exhaustion doctrine. See Howell above.
- c. ABCMR specifically:
 - (1) Majority view - appellant must exhaust ABCMR remedies. Exhaustion applied strictly in military cases. Guitard v. Sec’y of the Navy, 967 F.2d 737 (2d Cir. 1992); *see also* Horn v. Schlesinger, 384 F.Supp. 506 (E.D. Mo. 1974), aff’d 514 F.2d 549 (8th Cir. 1985).

- (2) Minority view - exhaustion of ABCMR remedy is permissive only. Horn v. United States, 671 F.2d 1328 (Ct. Cl. 1982). But note that the Federal Circuit is in accord with the minority view, Hurick v. Lehman, 782 F.2d 984 (Fed. Cir. 1986), Heisig v. United States, 719 F.2d 1153 (Fed. Cir. 1983).

3. Laches.

- a. An OER must be challenged within a reasonable time after it is issued. Adkins v. United States, 328 Ct. Cl. 909 (1981).
- b. Government is entitled to dismissal of an OER appeal if it can show inexcusable delay and prejudice. Pepper v. United States, 794 F.2d 1571 (F. Cir. 1986).

4. Standard of Review.

- a. Decisions of the ABCMR are reviewable in federal court. Jamison v. Stetson, 471 F. Supp. 48 (D.C. N.Y. 1978). *See also*, Randall v. United States, 95 F.3d 339, 348 (4th Cir. 1996).
- b. Decisions by Service Secretaries to follow/not follow ABCMR advice may be reviewable as well. Adkins v. United States, 68 F.3d 1317, 1322-23 (Fed. Cir. 1995).
- c. A party is bound by the ABCMR decision unless the decision is unsupported by substantial evidence or is arbitrary, capricious, or contrary to law. Randall, *supra*, at 348, *citing* Chappell v. Wallace, 462 U.S. 296, 303 (1983); Robbins v. U.S., 29 Fed. Cl. 717, 725 (1993).
- d. Courts apply a strong but rebuttable presumption that officers have discharged duties correctly, lawfully, and in good faith. Guy v. United States, 608 F.2d 867 (Ct. Cl. 1979).

- e. Courts will not interfere with rating process unless there is clear and convincing evidence of factors affecting ratings which had no place in the rating process. Savio v. United States, 213 Ct. Cl. 737 (1977).

5. Examples of Successful Appeals.

- a. Labeling an OER as an "Adverse Efficiency Report" by mistake. Horn v. United States, 671 F.2d 1328 (Ct. Cl. 1982).
- b. OER downgraded on mistaken belief superiors would not approve a high rating. Skinner v. United States, supra.
- c. Signing blank OER, rating downgraded by another. Hary v. United States, 618 F.2d 704 (Ct. Cl. 1980).
- d. Violation of regulation. Riley v. United States, 608 F.2d 441 (Ct. Cl. 1979).

6. Examples of Unsuccessful Appeals.

- a. Plaintiff did not show that ABCMR acted arbitrarily or capriciously in denying challenge based on racial discrimination. Randall, supra.
- b. Intentional downgrade in rating to show future job progression. Stewart v. United States, 611 F.2d 1356 (Ct. Cl. 1979).
- c. Using words and phrases from previous OERs and endorser's instructions to rater to downgrade rating. Gruendyke v. United States, 639 F.2d 745 (Ct. Cl. 1981).
- d. Rater claiming he rated appellant too low. Tanaka v. United States, 538 F.2d 348 (Ct. Cl. 1976). See also Savio v. United States, supra.
- e. Contested OER inconsistent with prior and subsequent OERs. Grieg v. United States, 640 F.2d 1261 (Ct. Cl. 1981).

7. Judicial Remedies.

- a. Courts may award backpay to successful appellant. Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979).
 - (1) Award is offset by civilian pay earned.
 - (2) Award cannot be based on an anticipated promotion.
- b. Courts may order removal of an OER/NCO-ER. Skinner v. United States, supra.
- c. Appellants can be reinstated in the service with their consent. Yee v. United States, 512 F.2d 1383 (Ct. Cl. 1975).
- d. Courts may order that a nonprejudicial statement be placed in appellant's file. Sanders v. United States, supra; Yee v. United States, supra.
- e. Under limited circumstances, courts may void promotion passovers and order relook boards.
 - (1) Harmless error standard applied. Riley v. United States, supra.
 - (2) Appellants must show a nexus between the board's action and the defective OER/NCO-ER. Hary v. United States, supra; Sanders v. United States, supra.
- f. Courts will not:
 - (1) Order promotions be made. Yee v. United States, supra; Skinner v. United States, supra.
 - (2) Reconstruct a report or order the Army to prepare a favorable OER to replace a defective OER. Turner v. Dept. of Army, 447 F. Supp. 1207 (D.D.C. 1978).

VII. CONCLUSION

